

No. 09-737

In the Supreme Court of the United States

MICHELLE ORTIZ, PETITIONER

v.

PAULA JORDAN AND REBECCA BRIGHT

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT*

**BRIEF FOR TEXAS, ALABAMA, ARKANSAS, COLORADO,
FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA,
IOWA, KANSAS, MAINE, MARYLAND, MICHIGAN,
NEBRASKA, NEVADA, NORTH DAKOTA, OKLAHOMA,
OREGON, SOUTH CAROLINA, TENNESSEE, UTAH,
VERMONT, WEST VIRGINIA, WYOMING, PUERTO RICO,
AND THE DISTRICT OF COLUMBIA
AS AMICI CURIAE SUPPORTING RESPONDENTS**

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AS AMICI CURIAE SUPPORTING RESPONDENTS**

INTEREST OF AMICI CURIAE

Amici curiae employ public officials who rely on the doctrine of qualified immunity to insulate them from litigation and liability. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 & n.30 (1982). Petitioner's argument in this case threatens to impose procedural roadblocks that would prevent officials from urging qualified immunity in the federal courts. Mindful of "the risk that fear of personal monetary liability * * * will unduly inhibit officials in the discharge of their duties," *Anderson v. Creighton*, 483 U.S. 635, 638 (1987), amici respectfully submit this brief in support of respondents.

SUMMARY OF ARGUMENT

Respondents are state officials who were entitled to take an interlocutory appeal from the district court's denial of their qualified immunity claims. Petitioner contends that the failure to pursue such an appeal prevents respondents from urging qualified immunity on appeal from a final judgment. Amici contest petitioner's attempt to force officials into taking unwanted interlocutory appeals in qualified immunity cases.

ARGUMENT

An Official Should Not Be Punished For Choosing To Forgo An Interlocutory Appeal From A Denial Of Qualified Immunity

“An easy case is especially likely to make bad law when it is unnecessarily transformed into a hard case.” *Ankenbrandt v. Richards*, 504 U.S. 689, 717 n.* (1992) (Stevens, J., concurring in the judgment). Affirming the Sixth Circuit's judgment is a straightforward affair, as respondents ably explain in their brief. That court had jurisdiction of respondents' appeal, and respondents' motion for summary judgment preserved the issue of qualified immunity for appellate review. Seeking to make an easy case hard, petitioner asks the Court to attach needless consequences to an official's decision not to pursue the interlocutory appeal recognized in *Mitchell v. Forsyth*, 472 U.S. 511 (1984). This would be bad law indeed.

Petitioner assigns great weight to the fact that respondents “chose not to bring an immediate appeal to challenge” the denial of their qualified immunity claims. Pet'r Br. 2-3. Such an interlocutory appeal

was open to respondents under the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). In identifying this additional source of appellate jurisdiction, however, petitioner does nothing to aid her cause.

An interlocutory order meets *Cohen*'s definition of "final decision[]," 28 U.S.C. 1291, if it is "conclusive, * * * resolve[s] important questions separate from the merits, and [is] effectively unreviewable on appeal from the final judgment in the underlying action," *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 605 (2009) (quoting *Swint v. Chambers County Comm'n*, 514 U.S. 35, 42 (1995) (citing *Cohen*, 337 U.S. at 546)). Applying this standard, the Court has held that "a district court's denial of a claim of qualified immunity, to the extent it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment." *Mitchell*, 472 U.S. at 530; see also *Behrens v. Pelletier*, 516 U.S. 299, 306 (1996); *Johnson v. Jones*, 515 U.S. 304, 311-312 (1995). "This is so because qualified immunity * * * is both a defense to liability and a limited entitlement not to stand trial or face the other burdens of litigation." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1945-1946 (2009) (internal quotation marks omitted). The latter trait—"an *immunity from suit* [that] is effectively lost if a case is erroneously permitted to go to trial," *Mitchell*, 472 U.S. at 526—carries certain denials of qualified immunity into the small class of immediately appealable orders recognized in *Cohen*, 337 U.S. at 545-547. See *Mitchell*, 472 U.S. at 524-530.

Respondents declined to pursue a *Mitchell* appeal. Resp't Br. 21 ("The parties agree that Respondents could have taken a collateral-order appeal after they were denied qualified immunity at summary judgment."). Petitioner contends that this failure to urge qualified immunity in an interlocutory appeal bars respondents from raising the issue upon review of the final judgment. This argument ignores the great weight of authority, threatens the sound functioning of the federal courts, and lays procedural traps for unwary officials. In affirming the judgment below, the Court should make clear that any interlocutory appeal from a denial of qualified immunity is optional, not obligatory.¹

A. Judge Friendly correctly stated the law where he wrote, "Failure to take an authorized appeal from an interlocutory order does not preclude raising the question on appeal from the final judgment." *Drayer v. Krasner*, 572 F.2d 348, 353 (2d Cir. 1978). The broad agreement on this point stretches over time and across the circuits. See, e.g., *Crowley v. Shultz*, 704 F.2d 1269, 1271 (D.C. Cir. 1983); *Colon v. R.K. Grace & Co.*, 358 F.3d 1, 4 (1st Cir. 2003); *W. States Mach. Co. v. S.S. Hepworth Co.*, 152 F.2d 79, 80 (2d Cir. 1945); *Victor Talking Mach. Co. v. George*, 105 F.2d 697, 699 (3d Cir. 1939); *Jamison v. Wiley*, 14 F.3d 222, 231 n.11 (4th Cir. 1994); *Caradelis v. Refineria Pan., S.A.*, 384 F.2d 589, 591 n.1 (5th Cir.

¹ Resolving the issue in this case will inform analysis in the sovereign immunity context—another topic of interest to amici. See *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 143-147 (1993) (allowing collateral order appeal from denial of sovereign immunity, on the strength of *Mitchell*).

1967); *Chambers v. Ohio Dep't of Human Servs.*, 145 F.3d 793, 796 (6th Cir. 1998); *Retired Chi. Police Ass'n v. City of Chi.*, 7 F.3d 584, 608 (7th Cir. 1993); *A. & R. Realty Co. v. Nw. Mut. Life Ins. Co.*, 95 F.2d 703, 707 (8th Cir. 1938); *Hook v. Ariz. Dep't of Corrs.*, 107 F.3d 1397, 1401 (9th Cir. 1997); *Allen v. Hadden*, 738 F.2d 1102, 1106 (10th Cir. 1984); *Hunter v. Dep't of Air Force Agency*, 846 F.2d 1314, 1316-1317 (11th Cir. 1988) (per curiam); *Brownlee v. DynCorp*, 349 F.3d 1343, 1347-1349 (Fed. Cir. 2003). Interlocutory appeal is but one entryway to appellate review—when that door opens, another does not close.

This principle applies in the context of qualified immunity, as elsewhere. An official who forgoes an interlocutory appeal from the denial of qualified immunity remains free to urge that legal issue on appeal from a final judgment. See, e.g., *Rivero v. City & County of San Francisco*, 316 F.3d 857, 862-863 (9th Cir. 2002); *Pearson v. Ramos*, 237 F.3d 881, 883-884 (7th Cir. 2001); *Ernst v. Child & Youth Servs.*, 108 F.3d 486, 492-493 (3d Cir. 1997); *Matherne v. Wilson*, 851 F.2d 752, 756 (5th Cir. 1988); *Kurowski v. Krajewski*, 848 F.2d 767, 772-773 (7th Cir. 1988); *McIntosh v. Weinberger*, 810 F.2d 1411, 1431 n.7 (8th Cir. 1987), *vacated on other grounds sub nom. Turner v. McIntosh*, 487 U.S. 1212 (1988); 15A Charles Alan Wright et al., *Federal Practice and Procedure* § 3914.10, at 683-684 (2d ed. 1992) [hereinafter *Wright & Miller*]. Under the prevailing view, *Mitchell's* brand of interlocutory appeal is purely optional. The official who abstains from such an appeal surrenders immunity from suit, but does not forfeit qualified immunity's protection against liability on appeal from a final judgment.

B. Petitioner argues that an interlocutory appeal under *Mitchell* should instead be mandatory. An official must suffer the consequences, the argument goes, if she “had the opportunity to appeal the denial of summary judgment before trial but failed to do so.” Pet’r Br. 27. Unless the official atones for the decision not to appeal by filing a pair of Rule 50 motions—which are procedurally superfluous, see Resp’t Br. 8-20—petitioner would preclude the court of appeals from considering qualified immunity on appeal from a final judgment. Pet’r Br. 29 n.3 (“[A] party choosing to forgo such a limited collateral-order appeal should not have these appeal rights reappear based on nothing more than the case simply proceeding in the normal course.”). Two points are offered in support of mandatory *Mitchell* appeals, but they are without merit. As Judge Easterbrook has observed, “Lawyers often argue that failure to take an available interlocutory appeal forfeits any opportunity to present the argument later, but this proposition has not fared well.” *In re UAL Corp.*, 468 F.3d 444, 453 (7th Cir. 2006).

1. Petitioner’s first point speaks to appellate jurisdiction. “[T]imely filing of a notice of appeal in a civil case is a jurisdictional requirement,” *Bowles v. Russell*, 551 U.S. 205, 214 (2007), with notice due within thirty days of the order or judgment from which appeal is sought, 28 U.S.C. 2107(a); Fed. R. App. P. 4(a)(1)(A). According to petitioner, the clock began to run with the interlocutory order denying respondents’ qualified immunity claims, and expired while respondents waited for the final judgment from which they ultimately appealed. Pet’r Br. 15-16, 28.

This argument is foreclosed by *United States v. Clark*, 445 U.S. 23, 25 n.2 (1980), in which this Court entertained an appeal from a final judgment despite a party's failure to pursue an available interlocutory appeal. *Clark* involved a jurisdictional statute that allowed direct appeal to this Court from an interlocutory or final order holding a federal statute unconstitutional. *Ibid.* (construing 28 U.S.C. 1252 (1976) (repealed 1988)). The *Clark* appellant could have taken an interlocutory appeal, but appealed instead from the final judgment. *Ibid.* Pointing to the thirty-day deadline for taking a Section 1252 appeal, see 28 U.S.C. 2101(a) (1976), the appellee contested jurisdiction on the ground that this deadline had lapsed in the time between the interlocutory order and the final judgment. *Clark*, 445 U.S. at 25 n.2. The Court disagreed: "Section 1252 would have allowed [appellant] to seek review of this interlocutory order declaring a federal statute unconstitutional, but its permissive language providing that any party 'may appeal * * * from an interlocutory or final judgment' plainly did not require [appellant] to appeal before final judgment was entered." *Id.* at 26 n.2. Cf. *Corey v. United States*, 375 U.S. 169, 175-176 (1963) (holding that criminal defendant's failure to take an available appeal upon commitment to Attorney General's custody did not preclude challenging conviction on subsequent appeal from final judgment).

The jurisdictional analysis in this case proceeds along the same lines and reaches the same result. See *Fairley v. Fermaint*, 482 F.3d 897, 900-901 (7th Cir. 2007) (rejecting a jurisdictional argument like petitioner's, in a qualified immunity case); *Ernst*, 108

F.3d at 492-493 (same); *DeNieva v. Reyes*, 966 F.2d 480, 484 (9th Cir. 1992) (same). Jurisdiction under 28 U.S.C. 1291 does not depend on the presence or absence of earlier opportunities for review, and the statute's text does not command parties to take interlocutory appeals. As this Court held in *Behrens*, 516 U.S. at 305-311, a qualified immunity case can produce multiple "final decisions" under Section 1291, each of which is independently appealable. Respondents could have taken an interlocutory appeal under the collateral order doctrine, but they decided to wait for a final judgment.

This was a proper method of invoking Section 1291 jurisdiction. Following a jury verdict, the district court "disassociate[d] itself from [this] case," *Swint*, 514 U.S. at 42, by entering a final judgment against respondents in the amount of \$625,000 and dismissing the action. See Pet. App. 19a-20a. "No one would doubt that a judgment awarding money damages to plaintiff on the only claim involved in the case is a final judgment." Charles Alan Wright & Mary Kay Kane, *Law of Federal Courts* 745 (6th ed. 2002). The district court thus "end[ed] the litigation on the merits and [left] nothing for [itself] to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945). Respondents timely filed a notice of appeal within thirty days of this final judgment, in accordance with Federal Rule of Appellate Procedure 4(a)(1)(A). Jurisdiction thus obtained under Section 1291.

Dickinson v. Petroleum Conversion Corp., 338 U.S. 507 (1950), does not support petitioner's jurisdictional argument. The district court had there issued a decree ending the case as to Petroleum,

while allowing further litigation between the remaining parties. *Id.* at 513-515. Petroleum awaited a decree ending the case as to these other parties and then appealed. *Id.* at 510. Concluding that “a decree may be final as to one party although the litigation proceeds as to others,” *Taylor v. Bd. of Educ.*, 288 F.2d 600, 603 (2d Cir. 1961) (Friendly, J.), this Court held that Petroleum’s “attempt to review the earlier decree by appealing from the later one is ineffective, and its appeal should be dismissed,” *Dickinson*, 338 U.S. at 516. The case had effectively ended, as far as Petroleum was concerned, when the earlier decree terminated its role in the litigation—at which point it should have appealed.²

Dickinson is distinguishable from this case because the interlocutory order from which respondents declined to appeal did not end the case as to them. Indeed, the denial of qualified immunity had the opposite effect of guaranteeing their participation in further proceedings. Having bypassed a collateral order appeal, respondents were nevertheless interested in the final judgment from which they subsequently appealed. Cf. *In re Kilgus*, 811 F.2d 1112, 1116 (7th Cir. 1987) (“A ‘final’ final order must be appealed forthwith; a ‘collateral’ final order need not be appealed but merges with the final judgment and may be appealed at the end of the case.”). By contrast, Petroleum sat on its right to appeal even though its “interests ‘could not possibly have been affected’ by any action that remained to be

² Federal Rule of Civil Procedure 54(b) would govern an identical scenario today. See *Dickinson*, 338 U.S. at 511-512.

taken by the district court.” *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 179, 181 (2d Cir. 1987) (quoting *Dickinson*, 338 U.S. at 515); see also Richard H. Fallon, Jr. et al., *Hart and Wechsler’s The Federal Courts and The Federal System* 1571 (5th ed. 2003) (“Are there, then, two kinds of final orders—those that may be treated as final at the option of the litigants and those that must be appealed now if at all? * * * Does a case fall into the latter category if the party contemplating an appeal cannot be affected by anything remaining for determination in the trial court?”). In appealing from the decree that ended the case from their perspective, respondents did exactly what *Dickinson* demanded of Petroleum.

Contrary to petitioner’s suggestion (Pet’r Br. 18, 20, 31), the exploration of Rule 50 in *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394 (2006), has nothing to do with appellate jurisdiction. The *Unitherm* Court had no occasion to address the jurisdiction of the courts of appeals in its treatment of Rule 50, for “it is axiomatic that the Federal Rules of Civil Procedure do not create or withdraw federal jurisdiction.” *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 370 (1978); see also *Snyder v. Harris*, 394 U.S. 332, 337-338 (1969). Those Rules “do not extend or limit the jurisdiction of the district courts,” Fed. R. Civ. P. 82, and do not govern the courts of appeals at all, see Fed. R. Civ. P. 1. As noted by one of their original draftsmen, “the [R]ules do not affect jurisdiction or deal with the powers of appellate courts.” *Audi Vision Inc. v. RCA Mfg. Co.*, 136 F.2d 621, 624 (2d Cir. 1943) (Clark, J.). To mistake *Unitherm*’s procedural discussion for a jurisdictional one is to ignore an elementary distinction.

2. Petitioner’s second point in favor of mandatory *Mitchell* appeals follows the lead of the Ninth Circuit. In *Price v. Kramer*, 200 F.3d 1237 (2000), the Ninth Circuit resisted “permit[ting] a post-trial appeal of a pretrial denial of qualified immunity.” *Id.* at 1244. Noting that *Mitchell* allows immediate review of a denial of qualified immunity, the court chided the officials before it “for their not having filed such an interlocutory appeal,” *ibid.*, and announced “the conclusion that such a ruling is not appealable after final judgment,” *id.* at 1244 n.6. This position on the appealability of denials of qualified immunity clashes with the prevailing view. See *Pearson*, 237 F.3d at 883 (noting conflicting decisions); Pet. Reply 10 (conceding that *Price* represents “the minority rule”).³

Expanding upon the Ninth Circuit’s reasoning, petitioner states that “[t]he *Price* court’s decision not to review, after trial, the pre-trial denial of qualified

³ In an unpublished memorandum on denial of rehearing, the *Price* panel elaborated on its opinion. *Price v. Kramer*, 17 F. App’x 508, 508 (9th Cir. 2000) (per curiam) (“[O]ur decision is fully consistent with the [view that] an interlocutory appeal from an adverse pretrial ruling on qualified immunity is permissive, not mandatory, and the *issue* is not waived in a later appeal.” (internal quotation marks omitted)). Having been released prior to 2007, this memorandum does little to clarify Ninth Circuit law because it essentially cannot be cited by litigants. See 9th Cir. R. 36-3(c). Perhaps as a result, the published opinion in *Price* has been construed to mean that “[p]arties intending to appeal the determination of qualified immunity *must* ordinarily appeal before final judgment.” *Johnson v. Walton*, 558 F.3d 1106, 1108 n.1 (9th Cir. 2009) (emphasis added) (citing *Price*, 200 F.3d at 1243-1244).

immunity reflects that such an order is indeed ‘effectively unreviewable’ after trial.” Pet. 14. Petitioner further proclaims that hearing respondents’ appeal from a final judgment “undercut[s] the heart of the collateral-order doctrine itself, which defines ‘final’ collateral orders as those that are ‘effectively *unreviewable*’ after trial.” Pet’r Br. 28 (citing *Price*, 200 F.3d at 1244).

Petitioner apparently misapprehends the term “unreviewable,” as used in *Mitchell*, 472 U.S. at 527, and reads that word for much more than it is worth. Qualified immunity “is *both* a defense to liability *and* a limited entitlement not to stand trial or face the other burdens of litigation.” *Iqbal*, 129 S. Ct. at 1945-1946 (emphases added) (internal quotation marks omitted); accord *Johnson v. Fankell*, 520 U.S. 911, 915 (1997); *Mitchell*, 472 U.S. at 526. A denial of qualified immunity is effectively unreviewable, and hence subject to appeal under the collateral order doctrine, because any immunity from suit is lost when the case goes to trial. But the official who forgoes an interlocutory appeal and submits to trial retains a strong interest in avoiding liability via qualified immunity. See, e.g., *SEC v. Quinn*, 997 F.2d 287, 290 (7th Cir. 1993); *Apostol v. Gallion*, 870 F.2d 1335, 1339 (7th Cir. 1989). That interest can be vindicated upon appeal from a final judgment, as evidenced by respondents’ Sixth Circuit victory.

C. A regime of mandatory *Mitchell* appeals is an unsound way of conducting federal judicial business. Petitioner’s proposal is absurd as a matter of institutional design, insofar as it would force parties to argue an appeal that neither of them wants to

take, in front of a court that does not want to hear the case. Nobody benefits from this arrangement.

In the interest of “efficient judicial administration,” *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981), the federal courts have long observed a so-called “final-judgment rule.” *E.g.*, *Cunningham v. Hamilton County*, 527 U.S. 198, 203-204 (1999); *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 429-430 (1985); *Cobbledick v. United States*, 309 U.S. 323, 324-325 (1940). Petitioner invites this Court to announce a contradictory rule that punishes the official who chooses not to appeal from an interlocutory order denying qualified immunity. The natural consequence of such a policy will be to burden the courts of appeals with piecemeal appeals that would otherwise be avoided. *Kurowski*, 848 F.2d at 772-773 (noting this concern and explaining that “[s]uch appeals come at great cost to the judicial system because they may prolong litigation and require appellate courts to cope with each case more than once”). From the circuit judge’s perspective, this is a losing proposition. *Pearson*, 237 F.3d at 883-884 (“Certainly from our standpoint * * * it is preferable for a party to file a single appeal at the end of the case rather than a series of interlocutory appeals.”). Petitioner’s jarring revision of the final-judgment rule promises “the mischief of economic waste and of delayed justice.” *Radio Station WOW v. Johnson*, 326 U.S. 120, 124 (1945).

Petitioner’s approach, if accepted, would not only yield a profusion of permissible interlocutory challenges that no one wants. It would also invite appeals in which appellate jurisdiction is lacking in the first place. In *Johnson v. Jones*, 515 U.S. at 319-

320, the Court held that “a defendant, entitled to invoke a qualified immunity defense, may not appeal a district court’s summary judgment order insofar as that order determines whether or not the pretrial record sets forth a ‘genuine’ issue of fact for trial.” Officials have struggled to determine appealability of qualified immunity denials under *Johnson v. Jones*, to the chagrin of the courts of appeals. See, e.g., *Charles v. Grief*, 522 F.3d 508, 516 (5th Cir. 2008) (“[W]e lack jurisdiction over such appeals of fact-based denials of qualified immunity, and we trust that counsel will in future interlocutory appeals make sure to challenge only those rulings involving questions of law and not waste valuable resources appealing those determinations over which we clearly lack jurisdiction.” (footnote omitted)). The threat of forfeiture may frighten confused officials into taking interlocutory appeals without due regard for *Johnson v. Jones*, leaving the courts to sort good appeals from bad. Cf. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 489 (1980) (Rehnquist, J., dissenting) (“Fearful that, by waiting for a ‘final order’ in the strict sense, I might forfeit my right to appeal certain aspects of the litigation, I probably would err in favor of filing an immediate appeal on whatever aspects of the case were bothersome at that time. From the standpoint of the federal appellate courts, such uncertainty can only result in numerous interlocutory, precautionary appeals.” (footnote omitted) (citation omitted)); *Exch. Nat’l Bank of Chi. v. Daniels*, 763 F.2d 286, 290 (7th Cir. 1985) (warning of a “blizzard of protective appeals”).

Consider, too, the effect of petitioner’s proposal on her fellow civil rights plaintiffs. Forcing officials to

take interlocutory appeals will halt trials that would otherwise proceed, for “[o]nce a notice of appeal has been filed in a case in which there has been denial of a summary judgment motion raising the issue of qualified immunity, the district court should then stay its hand.” *Johnson v. Hay*, 931 F.2d 456, 459 n.2 (8th Cir. 1991); see also *Harlow*, 457 U.S. at 818 (“Until this threshold immunity question is resolved, discovery should not be allowed.”); *Wright & Miller*, *supra*, § 3914.10, at 684 (“Since an immunity appeal is allowed in order to protect against the burdens of trial, ordinarily the district court should not proceed to trial, nor even impose substantial pretrial burdens, pending appeal.”). Even absent a stay, an interlocutory appeal arrests proceedings by divesting the district court of jurisdiction. See *Princz v. Fed. Republic of Germany*, 998 F.2d 1, 1 (D.C. Cir. 1993) (per curiam) (citing *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) (per curiam)). If an official is obliged to appeal each and every denial of qualified immunity—and under *Behrens*, 516 U.S. at 305-311, there could be several such appeals—then the underlying litigation will be pointlessly ossified. Petitioner thus poses a “threat to the appearance of evenhanded justice in civil rights cases.” *Id.* at 321 (Breyer, J., dissenting).

This Court has wisely opened the door to immediate review of denials of qualified immunity, *Mitchell*, 472 U.S. at 524-530, and officials will often avail themselves of this route. At times, however, “[t]here may be good reasons why a defendant may elect not to appeal before trial.” *Matherne*, 851 F.2d at 756. If an official is willing to forgo an interlocutory appeal, there is no reason for the

federal courts to inflict upon themselves “the debilitating effect on judicial administration caused by piecemeal appellate disposition.” *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974).

D. At bottom, petitioner seeks to convert *Mitchell* appeals into a procedural trap for the unwary. This is not in keeping with the Court’s precedent, which offers the interlocutory appeal for the benefit, not the detriment, of officials who depend on qualified immunity. “[T]he right to appeal before trial belongs to [an official], protecting him from money damages as well as from the costs of defending a suit.” *Matherne*, 851 F.2d at 756. The official should choose whether to exercise this option, free of the arbitrary consequences petitioner would impose.

This Court has never suggested otherwise. The opinion in *Mitchell* gives no indication that the interlocutory appeal therein recognized is mandatory. See *DeNieva*, 966 F.2d at 484 (refusing to “transform the permissive rule of *Mitchell*—that a defendant *may* appeal a denial of qualified immunity—into a requirement of immediate appeal that *Mitchell* does not announce (or even intimate)”). In discussing *Mitchell*, moreover, the Court has implied that any interlocutory appeal of an order denying qualified immunity is elective. *E.g.*, *Crawford-El v. Britton*, 523 U.S. 574, 600 n.21 (1998) (“If the official seeks summary judgment on [qualified] immunity grounds and the court denies the motion, the official *can* take an immediate interlocutory appeal * * *.” (emphasis added)); *Richardson v. McKnight*, 521 U.S. 399, 402 (1997) (citing *Mitchell* as “*permitting* interlocutory appeals of qualified immunity determinations” (emphasis

added)); *Fankell*, 520 U.S. at 915 (noting *Mitchell*'s holding that denials of qualified immunity “*may* be appealed immediately” (emphasis added)); *Lauro Lines s.r.l. v. Chasser*, 490 U.S. 495, 500 (1989) (“[C]laims of qualified immunity *may* be pursued by immediate appeal * * * .” (emphasis added)).

This is just as it should be. *Mitchell* extends to officials the option, but not the obligation, of a collateral order appeal. Failure to seek immediate review allows the litigation to proceed, thereby forfeiting some or all of the immunity from suit inherent in the doctrine of qualified immunity. No other consequence should attach to an official’s decision not to pursue an interlocutory appeal from the denial of qualified immunity.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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August 2010